SUNDARAM v. VEEMAH & ORS.

[O.C.J. (Wan Suleiman J.) November 18, 1971]

[Seremban — Originating Motion No. 20 of 1971.]

Industrial Law — Rest day and holiday pay claim — Toddy contractor — Obligation to prepare roster of rest days for labourers — Object of — Employment Ordinance, 1955, ss. 59(1), 60(3).

The issue to be decided in this case was purely a question of law, *viz.* whether there had been on the part of the employer (applicant) failure to determine the rest day under section 59(1) of the Ordinance (as amended by the Essential (Employment) Regulations, 1969) and the consequent failure "to prepare or caused to be prepared a roster before the commencement of the month on which the rest days fall, informing the labourer of the days appointed to be his rest days therein" under section 59(2).

The facts appear sufficiently from the judgment.

Held: (1) section 59(1) leaves the employer no choice but to fix the rest days himself, and the intention of the legislative authority in requiring him to prepare a roster before the commencement of the month in which the rest days fall, informing the labourer of the days appointed to be his rest days, is to enable him, *inter alia* to decide whether to request to be allowed to work on such day in accordance with section 60(2), and also to enable him to know when he is entitled to double pay on those occasions when he works on a rest day at his employer's request;

(2) the statutory duty under the Employment Ordinance, 1955 is one where no remedy by way of penalty for its breach is imposed, so that a right of civil action would accrue to the person who is damnified by the breach. The principle in *Groves* v. *Wimborne*(3) applied even though the damage was only pecuniary;

(3) therefore in this case the respondents were entitled to their claim for pay for working without rest days for the period of 44 weeks.

Cases referred to:-

(1) *Tan Chye Choo & Ors.* v. *Chong Kew Moi* [1970] 1 M.L.J. 1 P.C.

(2) *Phillips* v. *Britannia Hygienic Co. Ltd.* [1923] 2 K.B. 832.

(3) *Groves* v. *Wimborne (Lord)* [1898] 2 Q.B. 402.

MOTION.

V. K. Palasuntharam for the applicant.

N. Ramachandran for the respondents.

Wan Suleiman J.: The applicant is a toddy contractor and the first respondent a toddy tapper who had been authorised to lodge a claim on behalf of himself and his twelve fellow employees for rest day pay and holiday pay.

The Labour Officer, Seremban, as he is empowered to do under section 3(3) of the Employment Ordinance, 1955 inquired into this dispute in accordance with section 69(1) of the Ordinance.

In compliance with section 70(b) of the Ordinance, he examined the first respondent under affirmation on 24th September 1970, and thereafter on 14th October 1970 in the presence of the applicant, respondents and counsel for both parties, the applicant was again examined.

By consent the sum due to the respondents was agreed, so that what is left to be determined is whether the respondents were entitled to rest day pay and the amount of such pay due to them, if any. During the course of the inquiry the following additional facts were agreed to by counsel for the parties:—

(i) that there are 44 weeks during the period 10.10.69 to 14.8.70, the period during which the claim for rest day pay was being made;

(ii) that the average daily earnings of each respondent was $6.00;

(iii) that when the respondents commenced their employment with applicant, both he and a clerk had informed them that they were entitled to one rest day every week, which they were at liberty to take on whatever day they wished; and

(iv) that respondents had been absent on the days on which the letter "A" in red appears against their names on check roll Exhibit D 1.

In view of the agreed facts abovementioned, I do not consider that there is any merit at all in those grounds of appeal which dwelt upon burden of proof or in the other point taken up at the appeal *i.e.* that the complainants/respondents had not given evidence. It would also be proper to disregard the possibility that, because the applicant had admitted that he would have refused to allow all his employees to take their rest day on one and the same day, that the latters' freedom to choose their rest day was thereby in any way fettered.

The issues have thus been narrowed down to the point where what has to be decided is purely a question of law *viz.* whether there had been on the part of the employer (applicant) failure to determine the rest day under section 59(1) of the Ordinance (as amended by the Essential (Employment) Regulations, 1969 (PU(A) 409/69)) and the consequent failure "to prepare or caused to be prepared a roster before the commencement of the month on which the rest days fall informing the labourer of the days appointed to be his rest days therein" under section 59(2).

I am unable to accept the argument that a roster under section 59(2) need only be kept if the rest days are determined by an employer, and that therefore where as in the instant case the employees could choose their own rest days, no roster need be kept.

In *Maxwell* on Interpretation of Statutes, 7th ed. at page 183 it is said:

"In determining either the general object of the legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles, should, in all cases of doubtful significance, be presumed to be the true one."

In my view section 59(1) leaves the employer no choice but to fix the rest days himself, and the intention of the legislative authority in requiring him to prepare a roster before the commencement of the month in which the rest days fall informing the labourer of the days appointed to be his rest days is to enable him *inter alia* to decide whether to request to be allowed to work on such day in accordance with section 60(2) and also to enable him to know when he is entitled to double pay on those occasions when he works on a rest day at his employer's request.

The clause "where the rest day of the labourer is determined by his employer", should therefore be

treated as mere surplusage not in any way affecting the meaning of the remainder of the sub-section.

Mr. Palasuntharam for the applicant cited the Privy Council decision in *Tan Chye Choo & Ors.* v. *Chong Kew Moi*[1] as authority for the proposition that mere breach of a statutory duty did not give the respondents a cause of action.

In delivering the judgment of the Board, Lord Morris of Borth-y-Gest said at page 4:—

"Guidance as to the principles to be applied in considering whether there is a right of action in a person who claims that he has been injured by reason of a breach of statutory duty is to be found in the speeches in *Cutler* v. *Wandsworth Stadium Ltd.* [1949] A.C. 398. Lord Simonds in his speech at p. 407 said:-

'The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted...'

Lord du Parq in his speech pointed out that in the preceding quarter of a century in cases where it was being considered whether there was a right of action resulting from a breach of statutory duty 'the debate has normally turned on the question whether the case before the court falls within the decision in *Groves* v. *Wimborne (Lord)* ([1898] 2 Q.B. 402) or that in *Phillips* v. *Britannia Hygienic Co. Ltd.* ([1923] 2 K.B. 832)'."

I would with respect say that, on a consideration of the Road Traffic Ordinance, 1958, and the circumstances including the pre-existing law in which it was enacted, their Lordships of the Privy Council held that *Tan Chye Choo's* case fell within the decision in *Phillips* v. *Britannia Hygienic Co. Ltd.*[2]

However, the statutory duty under the Employment Ordinance, 1955 is one where no remedy by way of penalty or otherwise for its breach is imposed so that a right of civil action would accrue to the person who is damnified by the breach. To paraphrase A.L. Smith L.J.'s remarks in *Groves* v. *Wimborne*[3] the Employment Ordinance, 1955 is a public Act passed in favour of the workers to compel their employers to do certain things for their protection and benefit. In other words, the principle in *Groves* v. *Wimborne* should be applied. In my opinion this principle applies even though the damage is only pecuniary.

Since the right of action exists, the respondents have a right to resort to the similar remedy afforded by section 69(1) of the Ordinance.

Days on which the respondents absented themselves with the approval of the applicant cannot, I think, be "rest days" as envisaged under section 59, and I would merely regard such period of leave as approved leave without pay.

The respondents had therefore worked without rest days for the period of 44 weeks. It is difficult in the circumstances to decide whether the respondents had worked on 44 rest days at their own request or at the request of the applicant, their employer.

There shall be no order on the motion.

In view of the claim at ordinary rate of pay for one day's work for each of such rest days, however, I would confirm the order of the Labour Officer, Seremban, that a sum of $3,366 being rest day pay at $6 per day for 44 days per person be paid to the respondents. I also award the costs here and that of the inquiry before the Labour Officer, Seremban, to the respondents.

Motion dismissed.

Solicitors: *Gurdial Bakan Singh & Co.; Ramachandran & Co.*

M.Y. v. COMPTROLLER-GENERAL OF INLAND REVENUE

[A.C.J. (Abdul Hamid J.) November 24, 1971]

[Kuala Lumpur — Originating Motion No. 39 of 1971]

Income Tax — Assessable income — Whether taxpayer resident in Malaya — Meaning of "resident" — Income Tax Ordinance, 1947, s. 2.

Income Tax — Case stated — When decision of Special Commissioners reviewable by High Court — Income Tax Act, 1967, Sch. 5. para. 34.

This was a case stated pursuant to paragraph 34 of Schedule 5 of the Income Tax Act, 1967, for the opinion of the High Court, whether on the facts found by the Special Commissioners of Income Tax, there was evidence to support their finding that the appellant was not resident in the States of Malaya for the years of assessment 1966 and 1967 within the meaning of the word "resident" as defined in section 2 of the Income Tax Ordinance, 1947.

The facts found by the Special Commissioners were not in dispute and accordingly appear in the judgment.

Held, dismissing the appeal: (1) in the light of the definition of the word "resident", it would appear that to be a resident in a place, an individual must first of all reside in that place. He may be absent from that place provided that such absence is temporary and reasonable and is not inconsistent with his claim to be resident in that place. This is a matter of degree for the commissioners to determine, and it is not for the court to say whether it could have reached the same conclusion. Whether a person is resident in a place has always been a question of fact and the decision of the commissioners is final unless the courts decide there was no evidence on which the commissioners could properly have come to the conclusion at which they arrived;

(2) thus, in the instant case, the Special Commissioners had all the material facts which they reviewed as a whole before arriving at a conclusion, which was not open to review by the court.

[**Editorial Note:** The Income Tax Act, 1967 is now Act 53 of the Laws of Malaysia.]

Cases referred to:-

(1) *Egyptian Delta Land and Investment Co., Ltd.* v. *Todd* [1929] A.C. 1.

(2) *de Beers Consolidated Mines* v. *Howe* [1906] A.C. 455.

(3) *Commissioner for Inland Revenue* v. *Zorab* (1926) 11 T.C. 289.

(4) *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of Taxation* (1941) 64 C.L.R. 241.

(5) *Inland Revenue Commissioners* v. *Lysaght* [1928] A.C. 234.

(6) *Levene* v. *Inland Revenue Commissioners* [1928] A.C. 217.

(7) *Robertson* v. *Federal Commissioner of Taxation* (1937) 57 C.L.R. 147.